STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK JERMAINE CALBERT,

Defendant-Appellant.

UNPUBLISHED
April 18, 1997

No. 179739
Saginaw Circuit Court
LC No. 94-008765-FC

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder under an aiding and abetting theory. MCL 750.316(1)(b); MSA 28.548(1)(b). His first trial ended in a hung jury and was declared a mistrial. After defendant's conviction on retrial, the trial judge sentenced him to life imprisonment.

On appeal, defendant argues that the prosecutor failed to present sufficient evidence of aiding and abetting murder and shifted the burden of proof to defendant in his closing argument. He asserts that the trial court failed to give the jury an instruction on a lesser included offense, erroneously excluded excited utterance statements and erroneously denied him a change of venue.

We vacate the first-degree felony murder conviction and sentence, and remand for sentencing on the unarmed robbery conviction.

I

Defendant drove codefendant Michael Young from a party to a convenience store. Young robbed the store and, while fleeing, shot and killed the clerk. Defendant then drove Young back to the party. At trial, defendant maintained that he had no idea that Young intended to rob the store or that Young had a gun in his possession.

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* Circuit judge, sitting on the Court of Appeals by assignment.

II

Defendant first argues that the trial court improperly denied his motion for a directed verdict of acquittal. Defendant asserts that there was no evidence to show that defendant intended to help Young commit a robbery. We disagree. The evidence showed that defendant assisted Young in robbing the convenience store by driving him to and from the crime scene. His criminal intent to assist in the robbery thus became an issue for the jury to decide. *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992); *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Defendant argues, also, that he did not have the necessary intent for felony murder. We agree. In order to convict an aider and abettor of felony murder, the prosecution must present evidence of malice. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). Malice is a permissible inference from the codefendant's use of a deadly weapon. *People v Turner*, 213 Mich App 558, 567, 572; 540 NW2d 728 (1995). However, in this case, the prosecutor did not present enough evidence from which a reasonable juror could infer that defendant knew that his codefendant had a gun. A witness testified that he saw a gun in Young's waistband. He did not state whether it was before defendant and Young left for the store or after they returned. Another witness who rode in an automobile with defendant and Young just before they went to the store testified that he did not see a gun in Young's possession then. Therefore, evidence of defendant's malice is lacking, because there was nothing from which it reasonably could be inferred that defendant had knowledge of the gun in Young's possession before the robbery.

III

Defendant argues that the trial court failed to instruct the jury on his theory of accessory after the fact. At trial, he omitted to request the instruction for this cognate lesser offense. Hence, we will not reverse the verdict on this ground. *People v Pouncy*, 437 Mich 382, 386-387; 471 NW2d 346 (1991).

IV

Defendant argues that the trial court abused its discretion by denying his motion for change of venue. We disagree. When defendant moved for a change of venue, he argued only that his motion should be granted due to negative pretrial publicity. However, pretrial publicity alone does not necessitate a change of venue. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). Therefore, the trial court did not abuse its discretion by denying the motion. Defendant failed to show that there is either, (1) a pattern of strong community feeling against him and that the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it; or (2) an atmosphere surrounding the trial would create a probablity of prejudice. *Id.* Moreover, defendant failed to show that the jury was actually prejudiced. *Id*.

V

Defendant argues that the trial court abused its discretion by not admitting into evidence a witness' testimony that, following the killing, Young had told him he had "popped" a woman. We agree. The statement should have been admitted into evidence as a statement against Young's penal interests. MRE 804(b)(3). However, we do not reverse on this issue, because the error was not prejudicial. There never was a dispute as to who shot the victim; even the prosecutor in his closing argument admitted that it was Young who killed the victim. There was no prejudice, because defendant would not have gained from the introduction of the statement in question. *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972).

VI

Defendant also argues that comments he made to a witness when he returned to his house after driving Young back to the party should have been admitted as excited utterances. We disagree. After the shooting, defendant drove Young back to the party and stayed there for fifteen minutes before going home where he made the statements. The trial court properly excluded them. Although defendant did not behave normally when he made the statements, enough time had elapsed between the event and the time when defendant made the statements that he could have fabricated them. *People v Petrella*, 124 Mich App 745, 760; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985).

VII

Defendant argues that the prosecutor improperly shifted the burden of proof by arguing in closing that defendant should have produced the name of the person whom defendant said he and Young were going to visit before they stopped at the store. We disagree. Because defendant took the stand and testified on his own behalf, the prosecutor was permitted to comment on his failure to produce corroborating witnesses. *People v Stout*, 116 Mich App 726, 731; 323 NW2d 532 (1982).

We reverse defendant's conviction and sentence for first-degree felony murder and remand for sentencing on his conviction for unarmed robbery.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky